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# Burton Birkinshaw and Virginia E. Birkinshaw v. Robert R. Badertscher and Geraldine L. Badertscher : Brief of Appellant

Utah Supreme Court

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Lamar Duncan; Duncan and Duncan; Attorneys for Defendants and Appellants;

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Clk. George C. C. C.

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**IN THE DISTRICT COURT**  
**of Salt Lake County**  
**STATE OF UTAH**

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BURTON BIRKINSHAW and  
VIRGINIA E. BIRKINSHAW,

*Plaintiffs,*

vs.

ROBERT R. BADERTSCHER and  
GERALDINE L. BADERTSCHER,

*Defendants and Appellants.*

Case No. ~~88~~ 8870

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**APPELLANT'S BRIEF**

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and Appellants*

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## I N D E X

	<i>Page</i>
STATEMENT OF CASE .....	1
STATEMENT OF POINTS .....	5
ARGUMENT .....	5
CONCLUSION .....	10

## CASES CITED

Florida East Coast R. Co. vs. Eno, 99 Fla. 887 - 128 So. 622, 70 ALR 506. ....	10
Motor Contract Co. vs. Van DeVolgen - 162 Wash. 449, 298 Pac. 705 .....	8
Robinson vs. Rispin, 165 P. 979 - Cal. App. 536.....	10
Salisbury vs. Stewart - 15 Ut. 308 - 49 Pac. 777.....	6
Utah National Bank of Salt Lake City vs. Nelson - 38 Utah 169 - 111 Pac. 907 .....	6

## TEXT CITED

4 American Jurisprudence .....	9
14 American Jurisprudence 586 .....	7
14 ALR 672, 836 .....	7
79 ALR 29 .....	8
41 ALR 2nd 677 .....	8

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*Defendants and Appellants.*

Case No. 33

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**APPELLANT'S BRIEF**

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**STATEMENT OF FACTS**

**This is an appeal from only that part of the judg-**

ment made and entered on the 5th day of March, 1958, in which the Court ordered that "no attorneys fees are awarded to Defendants from Plaintiffs" (Tr. 13).

In this case Plaintiffs are the assignees of a seller under a uniform real estate contract. The fee holder one, Ivan O. Burke (a widower), on the 11th day of January 1956 entered into a real estate contract to sell his interest to James A. Hatch and Ruth B. Hatch, his wife. Hatch and his wife in turn entered into a real estate contract with Defendants and appellants herein, Robert R. Badertscher and Geraldine L. Badertscher, wherein the Badertschers also by virtue of a uniform real estate contract became the buyers and James A. Hatch and Ruth B. Hatch, his wife, became the sellers of the interest in the land heretofore acquired under the contract above mentioned between Burke and the Hatches.

Thereafter, to wit, on the 27th day of December, 1956, the Hatches assigned their interest in the contracts to Dennis H. Anderson and Ruth M. Anderson, his wife. Andersons thereafter, on the 15th day of January, 1957, assigned all of their interest in said contract to Burton Birkinshaw and Virginia Birkinshaw, husband and wife, who are the Plaintiffs in the lower Court and the Respondents herein.

In order to more clearly illustrate the devolvement of title appellants have set forth the following diagram:

DIAGRAM SHOWING DEVOLVEMENT OF  
EQUITABLE INTERESTS IN AND TO A CERTAIN  
REAL ESTATE CONTRACT

Civil No. 114403

Burk

SELLS

(Uniform R. E. Contract) (I infra)

Hatch, et ux

Hatch et ux ..... Hatch et ux

SELL

ASSIGNS (3)

(Uniform R. E. Contract) (2)

Badertscher (Def.)

Anderson et ux

Anderson et ux

ASSIGN (4)

Birkinshaw (Plf.)

Badertscher sues ..... Birkinshaw (Plf.)

The real estate, the subject of this action is situated in Salt Lake City, Salt Lake County, State of Utah, and described as follows:

Commencing at a point 3 rods South of the Northwest corner of Lot 4, Block 57, Plat "B", Salt Lake City Survey, and running thence East 10 rods, thence South 4 rods; thence West 10 rods; thence North 4 rods to the place of beginning.

Plaintiffs and Respondents herein, after having given notice to Defendants and Appellants herein commenced an action for unlawful detainer alleging that under and by virtue of the real estate contract and assignment Defendants and Appellants had failed to comply with the terms of said agreement and that they were therefore entitled to the immediate restitution and possession of the premises, together with a cancellation of the uniform real estate contract, for treble damages for each day holding over as provided by law and for costs.

Defendants denied all of the allegations of the complaint and further, under and by virtue of the following provision, contained in said uniform real estate contract, to wit, "should they default in any of the covenants and agreements contained herein, to pay all costs and expenses that may arise from enforcing this agreement, either by suit or otherwise, including a reasonable attorney's fee" asked the Court for an award of a reasonable attorney fee, they having been compelled to engage the service of an attorney.

The trial came on for hearing January 14, 1958, before the Hon. Aldon J. Anderson, one of the Judges of the District Court sitting without a jury.

### STATEMENT OF POINTS

The Court erred in denying Defendants and appellants herein, a reasonable attorney's fee under the provisions of said real estate contract.

### ARGUMENT

The Plaintiffs and Respondents herein relied solely on the real estate contract to support any cause of action they may have had which recites as follows:

“That the buyers and seller agree that should they default in any of the covenants and agreements contained herein, to pay all costs and expense that may arise from enforcing this agreement, either by suit or otherwise, including a reasonable attorneys fee.”

Plaintiffs and Respondents herein commenced an action which they were unable to sustain, but which nonetheless Defendants and Appellants herein were compelled to defend in order to protect their interest in the real property. The very purpose of the provision in the contract was to help guard against the situation which Respondents have caused by the commencement of an action upon which they were unable to recover and therefore unable to sustain. It was not appellant's doing but solely respondents' who created the situation whereby



appellants were compelled to engage counsel to protect their equity in the property.

All of the parties relied solely on the uniform real estate contract to establish the respective interests of each in the land described therein. The contract provides for the payment of a reasonable attorney's fee, and all expenses incident to the enforcement of the contract. The attorney's fee therefore immediately becomes a matter to be considered along with other expenses in the enforcement of the contract.

As to the question of attorney's fees and the agreement between the parties to pay an attorney's fee in case of a default in the terms by either of the parties the Honorable Court in 1909 in the case of *McCornick vs. Swen*, 36 Utah 6, 102 Pac. 626, held that a provision in a promissory note, by which the maker agrees to pay a reasonable sum as attorney's fees, does not render the note non-negotiable. This early Utah case was reaffirmed in *Utah National Bank of Salt Lake City vs. Nelson*, 38, Utah 169; 111 Pac. 907. In 15 Utah 308, 49 Pac. 777, *Salisbury vs. Stewart* (1897), this Court held: "the fact that the makers of a promissory note undertake to pay an attorney's fee if suit be brought to enforce the collection of the note does not render the note non-negotiable. The Court: "It appears right that the parties whose default caused the expense should pay it; that it should not be imposed upon the party who kept his contract. The party who keeps a contract should receive

from the one who breaks it compensation for his loss. If the defendants had kept their contract, the holder would have received \$3,500 and the interest. They not having done so, the stipulation and the law required the makers to pay him that amount, and no more, for his own use, and to pay the costs of the court and attorney's fee. Only the costs of the court could have been charged against the defendants without the stipulation. The stipulation, in effect, also added the fee of the attorney, if one should be employed to bring the suit, to the costs imposed by the law upon the defendants. The fee is for the attorney. If the employment of an attorney does not become necessary, or if one is not employed, the court should not allow such a fee, and the allowance should not exceed the amount charged by the attorney. The allowance is not as a penalty, as interest, or as a bonus. It is simply to pay the costs of enforcing the collection of the note by suit."

146 ALR 672, 836.

14 Am. Jur. 586, #159: "While there is some conflict with respect to the right of the grantee in a deed to recover from his grantor, in an action for breach of a covenant of title, counsel fees incurred by him in unsuccessfully defending the title to the premises, according to the great weight of authority the reasonable attorney's fees which the plaintiff was required to pay or for which he has become legally obligated to pay in his attempt to defend the title are recoverable. In other words, the reasonable expense necessarily incurred for

attorney's fees in defending the title is considered a legitimate outcome of the failure of the title and a proper element of damages to be allowed in an action for breach of covenant, at least, where the covenantor is notified of the action and does not undertake the defense. This view regards counsel fees as the legitimate outcome of the failure of title. This rule allowing attorneys' fees to be recovered has been applied in actions involving breaches of covenants of warranty and covenants against encumbrances.

In *Motor Contract Co. vs. Van De Volgen*, 162 Wash. 449; 298 Pac. 705, 79 ALR 29, the court held a stipulation in a conditional sales contract for the recovery of a reasonable attorney fee to be fixed by the Court, is not contrary to public policy.

See also 41 ALR 2nd 677.

The plaintiff in the present case was an assignee of one of the original parties to said agreement and therefore claims some sort of immunity to the terms thereof. "It is well settled, however, that the assignee takes subject to the assignment with all the rights hereto possessed by the assignor, and a claim good in the hands of an assignor is ordinarily equally good and free from defenses in the hands of his assignee. An assignee of a non-negotiable chose in action ordinarily, however, acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter. He normally takes subject to all equities and defenses

which could have been set up against the chose in the hands of the assignor at the time of the assignment." (4 Am. Jur. 311, 103.)

4 Am. Jur. 311 Sec. 104.

**ASSIGNMENT OF CONTRACT AS PASSING BENEFITS SUBJECT TO BURDENS:** It is not to be inferred from the rule that the assignee of a contract is not personally responsible to the other party for the obligations imposed by the contract on the assignor unless he assumes such obligations, that he may enforce the contract without the performance of the obligations which it imposes. On the contrary, he takes the right with all the burdens to which it was subject in the hands of the assignor, and if he undertakes to enforce the right by an action, he must show that the conditions have been performed either by his assignor or by himself. The assignee is bound by the terms of the contract to the same extent as the assignor.

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terms of the contract to the same extent as the assignor.

*Florida East Coast R. Co. v. Eno*, 99 Fla. 887, 128 So. 622, 70 ALR 506: "When a contractor assigns all sums due or to become due him from the owner under a construction contract, the assignee occupies the same position as the assignor with respect to such moneys, having the same right, and being subject to the same equities, conditions, and defenses, the assignment not being a negotiable instrument.

In the case of *Robinson vs. Rispin*, 165 P. 979 33 Cal. App. 536, the Court held that while mere assignment of an executory contract does not make the assignee liable to the other party, yet, where the contract is fully performed and the benefit inures solely to the assignee, and he recognizes the contract as binding, he is liable to the other party equally with his assignor.

## CONCLUSION

The Plaintiffs and respondents, by their interpretation of the contract and demands served on Defendants and Appellants, plus the action which they have brought to enforce their demands, have forced Defendants to seek counsel to defend themselves. The ultimate effect of Plaintiffs' action was to foreclose Defendant's equity in the premises, even though it is by a possessory action. The effect is all the same. For this trouble and expense Defendants are entitled to be reimbursed and to an award of a reasonable attorney's fee.

The matter of sustaining an agreement to pay a reasonable attorney's fee has been reaffirmed many times by this Court. The defendant was put to the expense of defending his interest in the land by virtue of the contract which he had with one of the assignees of the oriignal vendor. We therefore submit that the action should be reassigned to the trial court for the purpose of determining and awarding a reasonable attorney's fee.

Respectfully submitted,

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and Appellants*